United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

75-4132

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CORRECTED COPY

No. 75-4132

WESTERN UNION INTERNATIONAL, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION and
THE UNITED STATES OF AMERICA,
Respondents,

ITT WORLD COMMUNICATIONS, INC.,
STATE OF HAWAII, WESTERN UNION TELEGRAPH COMPANY,
Intervenors.

B/S

PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

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STATEMENT OF THE ISSUE PRESENTED

Whether the Federal Communications Commission's action in allowing The Western Union Telegraph Company to file an application for authority to extend a new record service called "Mailgram" between the United States Mainland and Hawaii, an international area under the Communications Act, was a reasonable construction of that Act in view of the controlling language of Section 222(c)(2) which required Western Union to divest only its international telegraph operations "theretofore" carried on following its merger with The Postal Telegraph Cable Company?

COUNTERSTATEMENT

Petitioner, Western Union International, Inc. (WUI), an international record communications carrier, seeks review of a Memorandum Opinion and Order, 55 FCC 2d 668, entered by the Federal Communications Commission on June 23, 1975. (A. 1). In its order, the FCC held that an application of The Western Union Telegraph Company (WU) for authority to provide a new record service known as "Mailgram" beyond continental United States was acceptable for filing and that Section 222 of the Communications Act did not bar the comparative consideration of WU's application to extend such service to Hawaii, an international point within the meaning of Section 222.1/ (A. 7-60). ITT World Communications Inc. has intervened in support of petitioner WUI, while the State of Hawaii and WU have intervened in support of the FCC order. (A. 279, 305 and 311). This Court's jurisdiction is based on 47 U.S.C. §402(a), (1971), and 28 U.S.C. §§2342, 2343 (1971).

1/ 47 U.S.C. §§222(a)(6), (10) and (c)(2). (1971). As will be discussed below, WU is a domestic record common carrier separate and distinct from WUI. (A. 32).

A. Background: Section 222, Past and Present Industry Structure

The passage of Section 222 as an amendment to the Communications Act was the result of a thorough Congressional analysis and evaluation of the problems confronting the telegraph industry prior to World War II. Although the subject of broad investigation, the amendment eventually became a particularized legislative enactment designed to assist a faltering industry vital to the needs of the public during a period of national emergency.

Prior to its adoption, the domestic telegraph industry was comprised of three telegraph carriers. WU was the leader, followed by the American Telephone and Telegraph Company (AT&T) 2/ and the Postal Telegraph Cable Company (Postal). Subsequent to World War I, Postal had experienced a steady decline in revenues and by 1943 appeared to be in imminent danger of financial collapse. WU had likewise experienced an economic downturn and was viewed with concern. S. Rep. No. 769, 77th Cong. 1st Sess. (1941); (A. 30-31).

In order to strenghten this industry, Congress initiated an extensive review looking toward the enactment of remedial legislation. S. Res. 95, 76th Cong., 1st Sess.

2/ AT&T, in addition to its basic telephone service, also provided teletypewriter exchange service (TWX) and telegraph-grade leased-channel services. It did not furnish public telegraph message service (PMS). (A.30).

(1939). As the Senate's sponsor reviewed the plight of the industry, he observed:

> "The last few years have...seen new developments in the communications field which bid fair to do to the telegraph companies what the buses, trucks, and the airplane did to the railroads. Modern high-speed, economical, streamlined methods are gradually, but surely taking away the business of the telegraph companies. The telephone, the radio, teletype, air mail, and all the other newer means of communication are beginning to tell their story." Hearings on S. Res. 95 Before a Subcommittee of the Committee on Interstate Commerce, 76th Cong., 1st Sess. 2 (1939).

Before the passage of Section 222, WU and Postal were the only competitors in the provision of domestic pickup and delivery of public message telegraph service (PMS). With the threat of imminent financial disaster, Congress determined that a merger or consolidation of the remaining domestic carriers would better serve the public interest than continued government subsidy of Postal or outright government ownership. See S. Rep. No. 769, 77th Cong. 1st Sess. 5 (1941); see also, S. Rep. No. 1490, 77th Cong., 2nd Sess. (1942). As a consequence, Congress proposed that WU and Postal be allowed voluntarily to consolidate their operations as the best means of affording

the nation a viable domestic telegraph message service. S. Rep. No. 769, 77th Cong., 1st Sess. (1941); H.R. Rep. No. 2664, 77th Cong., 2nd Sess. 2 (1942); S. Rep. 13, 78th Cong. 1st Sess. (1943).

Congress was also concerned with the soundness of the international record carriers and included them within the ambit of its investigation. As the legislation was introduced, it was structured to permit both a merger of domestic carriers and a separate merger of international carriers. However, at the urging of the Navy and War Departments, the provisions permitting a permissive merger of the international carriers were deleted as being inimical to the war effort. S. Rep. 13, 78th Cong., 1st Sess. 7 (1943). Ultimately, Section 222 passed as a result of Congressional compromise on March 6, 1943. Conf. Rep., 78th Cong. 1st Sess. (1943). WU was allowed to effectuate a merger with Postal.

Since WU could emerge as a virtual monopoly in the domestic message telegraph industry, Congress included several ancillary provisions designed to control any abuses it feared might occur from that monopoly position. At the time, WU also engaged in international telegraph operations through its Cables Division in competition with the other international carriers. Thus, Congress was aware that WU could be in a position to use its newly-acquired domestic

monopoly unfairly to divert international traffic to its international division. 89 Cong. Rec. 1092 (Feb. 18, 1943).

With this in mind, Congress included in Section 222 the divestment provision under which WU following its merger with Postal was to relinquish its "international telegraph operations theretofore carried on...within a reasonable time to be fixed by the Commission...and as soon as the legal obligation...of the carrier...will permit." 47 U.S.C. §222(c)(2).3/ Eventually, WU sold its international Cables Division to a new entity, Petitioner WUI. See Application for Merger of the Western Union Telegraph Co. and Postal Telegraph, Inc., 35 FCC 233 (1963).

As previously noted, the enactment of Section 222 was directed toward and served to assist a declining domestic telegraph industry. It endorsed, subject to appropriate FCC findings, the acquisition by WU of Postal and creation of a single domestic entity and required the divestiture of WU's international telegraph operations "theretofore carried on." (A. 32, 33). But as the Commission later observed:

> [T]here have been significant changes both in the composition of international record traffic and in the facilities and services

3/ At the time of merger, WU was committed, inter alia, to certain long-term cable leases with the Anglo-American Telegraph Company which inhibited the prompt divestitute of its international telegraph operations. See Western Union Telegraph Co. v. United States, 267 F.2d 715 718-19 (2d Cir. 1959).

> available to handle such traffic. At the time of merger, international message traffic contributed the major portion of total international communications revenues whereas it now contributes a minor portion of such revenues and a decreasing share of international record carrier revenues. In 1943, the primary, if not the only method of handling international message telegraph traffic in the hinterland, was through the domestic facilities of Western Union (and, prior to merger, of Postal). Since that time, there has been a rapid development in domestic teleprinter exchange and other services.... [T]elephone service has expanded tremendously since 1943 so that it is directly available to the vast majority of the people of the United States.... On the telegraph side, Western Union has, since the domestic merger, closed hundreds of its smaller offices throughout the country and in New York in an effort to modernize its operations and to follow the shift from over-the-counter to telephone and machine-operated pickup and delivery.
>
> As a result of these developments, an increasing amount of international telegraph message traffic is specifically routed via a particular international carrier, including messages filed directly with such carrier by hinterland users, and this trend is expected to continue in the years ahead. International Record Carriers' Communications, 38 FCC 2d 543, 545-46 (1972).

In view of these developments, inroads have been made into the domestic monopoly position WU obtained as a result of the 1943 merger and a decline in the dependence on it by the international carrier for pickup and delivery services. WU is now also faced with the entry of international carriers into the domestic sphere offering a variety of communications services in direct competition with it. For example, RCA has

begun operations in the domestic satellite communications market (see, e.g., RCA Global Communications, Inc., 42 FCC 2d 774 (1973), and 56 FCC 2d 660 (1975). Further, an affiliate of ITT has been authorized to enter the domestic specialized communications private-line market as a domestic microwave carrier. 4/ United States Transmission System, 48 FCC 2d 859 (1974).

B. WU's Mailgram Application.

On April 4, 1972, WU filed its application with the Commission for authority under Section 214 of the Communications Act to lease and operate certain satellite facilities between the United States Mainland and the State of Hawaii for the purpose of extending its Mailgram service to that international point.5/ (A. 71).

On January 1, 1970, WU had inaugurated its Mailgram service on the United States mainland as an experimental authorization. Since that date its service within the continguous 48 states has expanded to the point that by the

4/ Private-line service provides a customer full-time use of a dedicated circuit, or circuits, for a fixed periodical charge. The private line may be used for numerous communications functions including, among others, voice, data and facsimile. See Specialized Common Carrier Services, 29 FCC 2d 870, reconsideration denied, 31 FCC 2d 1106 (1971), aff'd sub. nom. Washington Utilities Transporation Commission v. FCC, 513 F.2d 1142 (9th Cir. 1975), cert. denied, 423 U.S. 836 (1975).

5/ By virtue of congressional amendment, Hawaii's admission as a State had no effect on its status as an international point for the purposes of the Communications Act. 47 U.S.C. §§222(a)(6) and (10). See Telegraph Service with Hawaii, 28 FCC 599, aff'd on reconsideration, 29 FCC 714 (1960).

end of 1973 volume exceeded 300,000 messages per week and by March 1975 monthly volume approximated 2 million messages.6/

Mailgram is a unique form of record communications service offered by WU in conjunction with the United States Postal Service. "Essentially Mailgram may be classed as 'electronic mail' which combines some aspects of a traditional telegram with those of mail into a hybrid form which is identical to neither." (A. 23). The most distinquishing feature of Mailgram from ordinary public message service is that the delivery function is the exclusive responsibility of the Postal Service. (A. 23). It provides a low-cost, rapid communications medium available to numerous users by various means.

On the Mainland, a customer may place his message for transmission by, among others, telephone, telex, TWX, tieline, over the counter, by messenger or facsimile. Operationally, the message is then transmitted over WU circuits to a computer switching center. There the computer transmits the Mailgram over dedicated circuits to a preselected serv-

6/ See Establishment of Interim Mailgram-Type Service for the State of Hawaii, FCC 75-1414 (Dec. 22, 1975).

ing post office. At the post office, the Mailgram is received on a high capacity teleprinter supplied by WU which prints the message on special paper. A postal employee inserts the message in an envelope and places it in the mail for the next regular mail delivery. In some instances, due to time zone differentials, same day delivery may be achieved.7/

On April 19, 1972, the FCC's Common Carrier Bureau determined, under delegated authority, that WU's Mailgram application for service to Hawaii could not be accepted for filing because it interpreted Section 222 as precluding WU from providing future international telegraph services. (A. 69).

C. The Commission's Order

WU filed an application to review and after affording all parties ample opportunity to articulate their views,8/ the Commission determined that Section 222 did not

7/ The Commission's detailed analysis of the dissimilarities between Mailgram and ordinary public message telegraph service is set forth in its decision at A. 22-27. See also United Telegraph Workers v. FCC, 436 F.2d 920 (D.C. Cir. 1970).

8/ ITT did not participate as a party during the review proceeding. It had earlier filed a petition to reject WU's application prior to the Bureau Chief's ruling. However, the Bureau Chief returned the pleading to ITT as premature but without prejudice to resubmitting its pleading at an appropriate time should WU's application be accepted for filing. (A. 105-108). On the other hand, RCA who had been vigorous in its opposition to the WU application has not intervened in this proceeding.

bar the filing of WU's application to provide Mailgram service to Hawaii. WU's application was therefore accepted for filing and comparative consideration.9/ However, the Commission did not rule on the merits of WU's proposal but rather allowed it opportunity to pursue its application in comparative proceedings with other carriers who had applied for similar service authorizations.

Accordingly, the Commission emphasized the narrowness of the question under review. It found that the divestment clause of Section 222 was merely a part of an overall legislative effort. Hence, Section 222(c)(2) was not a permanent bar to WU provision of a new international communications service. (A. 14, 15). Contrary to the claims of WUI and RCA, the Commission could not find any reasonable basis either in the statute or its accompanying legislative history to support a broad interpretation of the divestment clause to prevent WU from providing the proposed new service to Hawaii. (A. 16, 17).

9/ At the time of the Commission's order, applications to provide a like communications service to Hawaii had been filed by RCA, ITT, WUI (Telepost), The Hawaiian Telephone Company (Mailgram) and the Domestic Satellite Corporation (Lettergram). (A. 20).

Congress had not intended by its enactment of Section 222 to divide the communications market into domestic and international spheres. Rather, Congress was attempting to alleviate the pressing problems of the telegraph industry in 1943. (A. 17). This was its primary purpose and the restrictions it embodied within the fabric of the statute were incidental to its overall design. Viewed reasonably and as a whole, the restrictions placed upon WU were calculated to reduce to a minimum any abuses by WU from its position as a domestic entity with considerable public message operations within the United States. This Congress achieved by the divestment clause and the imposition of a formula under Section 222(e)(1) to govern distribution of record traffic on an equitable and just basis pending divestment by WU of its international public message telegraph operations.

In essence, the Commission's decision rested upon a fair reading of the terms of the divestment clause which required WU to remove itself from engaging in those types of international telegraphic operations "theretofore" carried on in 1943. Since Mailgram represented a new and distinctly different service from public message telegraph, which was WU's predominant service offering in 1943, the Commission found that the extension of this service to

Hawaii was not foreclosed because Mailgram service does not present the danger Congress sought to prevent in enacting the divestment clause. A comprehensive review of the merger legislation did not reveal a congressional intent absolutely to exclude WU from reentry into international operations, or to limit the otherwise broad powers vested in the FCC by the Communications Act. Thus, "where Congress provided a comprehensive scheme covering the narrow situation before it, it gave no indication of an intent to legislate for future situations involving different technology and service patterns or to supersede other pertinent sections of the Act." (A. 44).

On the record before it, the Commission concluded that there appeared no potential for abuse by WU which concerned Congress in establishing the divestment clause in 1943. (A. 22). Furthermore, if after comparative consideration more than one carrier should be selected it could not assume that WU would act unfairly. In any event, the Commission has ample authority to rectify any abuses that may occur. Finally, the Commission observed that Section 222 was not enacted to insulate the international carriers from competition if found to be in the public interest. (A. 22). This petition for review followed. 10/

10/ In order to afford the citizens of Hawaii the availability of that popular service without further delay, the Commission has granted temporary authority to provide Mailgram service on an interim basis commencing March 1, 1976 until such further order of the Commission but not beyond September 1, 1976. The participating carriers in this interim arrangement are WU, ITT, RCA, WUI and the Hawaiian Telephone Company. This action was taken without prejudice to the rights of any party to the instant proceeding. Establishment of Interim Mailgram Type Service, supra, FCC 75-1414, ___ FCC 2d ___. (Dec. 22, 1975).

ARGUMENT

This controversy began when WU filed an application proposing to provide Mailgram service to Hawaii. Earlier, in 1970, Mailgram service on the Mainland by WU had been established after the D.C. Circuit agreed that the FCC's statutory power to experiment with new and innovative developments supported an experiment with Mailgram service. United Telegraph Workers v. FCC, 436 F.2d 920 (D.C. Cir. 1970).

Petitioner WUI and Intervenor ITT seek dismissal of WU's application to expand its Mailgram service to Hawaii, before the merits of WU's application can be compared with several other applications proposing similar service. WUI argues that when Congress in 1943 required WU to divest itself of "the international telegraph operation theretofore carried on," 47 U.S.C. 222(c)(2), Congress intended to bar WU in perpetuity from any type of international telegraph service. ITT goes further and argues that Congress intended to divide the telegraph industry into separate domestic and international sectors and to prevent domestic and international carriers from operating in each other's sector.

The Commission concluded, that the language of the divestment clause did not impose upon WU "an all-encompassing bar to future international or overseas operations. The operative language provides only that WU must divest itself of the international telegraph operations in which it had

'theretofore' engaged." (A. 32, 33). In the absence of a countervailing legislative intent, the Commission concluded that the divestment clause should be interpreted "to apply only to the types of operations engaged in by WU at the time of the merger in 1943." (A. 33). Since Mailgram service was not among WU's international operations at that time but was a new service inaugurated in 1970 the Commission reasonably determined that Section 222 did not prohibit WU from being considered to provide Hawaii Mailgram Service.

We submit that had Congress wished to prohibit WU from ever again participating in the international sphere it could certainly have said so. However, in the absence of any language to this effect, the only proper conclusion is that Section 222 was meant to be reconciled with the rest of the substantive provisions of the Communications Act. Moreover, the legislative history shows that Congress in enacting the divestment requirement was addressing the highly specific situation of an apparently failing telegraph industry. See Counterstatement pp. 3-4 . Congress did not attempt to legislate in the divestment clause a permanent market structure for the telegraph industry. Accordingly, once WU had divested its international public message operations and was no longer in a position unfairly to favor its Cables Division,the legislative purpose was fulfilled. This, however, does not mean that a later time under vastly changed

circumstances that the Commission was deprived of the discretion essential to the fulfillment of its duty throughout the Act to encourage the development of a strong and efficient communications service in the public interest; so long as the danger prompting the divestment requirement does not exist.

WUI and ITT's argument that Section 222(c)(2) is a permanent bar to WU international operations of any kind is not supported by the statute or its legislative history. Their argument rests on a reading of the statute as an attempt to divide the record industry permanently into a separate domestic and an international industry. Of course, the judiciary has consistently held that the Commission's construction of its own statute is entitled to great deference, even when constitutional issues are involved. Red Lion Broadcasters v. FCC, 395 U.S. 367 (1969), CBS v. DNC, 412 U.S. 94, 121 (1973), See also AT&T v. FCC, 503 F.2d 612 (2d Cir. 1973). Here we will show that the Commission's narrow ruling, which merely permitted WU to file its application and receive comparative consideration under the public interest standard was a reasonable construction of the statute: First, it finds firm support in the plain language of the statute, as well as judicial and administrative construction previously accorded the

operative words. Second, the finding that Mailgram is a new service is supported by administrative and judicial precedent. Third, the Commission's order accepting WU's application does not transgress the statutory purpose of Congress in enacting the divestment clause.

BOTH THE LANGUAGE OF SECTION 222(c)(2) AND ITS LEGISLATIVE HISTORY SUPPORT THE COMMISSION'S POWER TO AUTHORIZE WESTERN UNION TO PROVIDE NEW INTERNATIONAL TELEGRAPH SERVICES DEVELOPED SUBSEQUENT TO THE REQUIRED DIVESTITURE.

I. This Court has consistently held that "there is no justification to resort to legislative history [when] the language of the statute is not ambiguous. The cases so holding are legion. . . ." ATT v. FCC, 503 F.2d at 616. The plain language of Section 222(c)(2) requires that WU divest those "international telegraph operations theretofore carried on." 47 U.S.C. §222(c)(2). (emphasis added) We submit that the best evidence of Congressional purpose is the text of the statute itself. Moreover, "words in statutes must be given their common ordinary meanings," unless persuasive reasons appear to the contrary. Sheehan v. Scott, 520 F.2d 825, 829 (7th Cir. 1975); AT&T v. FCC, 503 F.2d at 616.

Petitioner WUI and Intervenor ITT, ignore the plain language employed by Congress in establishing the divestment provision. Congress' choice of the operative phrase "theretofore carried on" was not an inadvertence or

casual act in legislative drafting. This language appeared in every proposed version of Section 222 as it progressed in the Congress toward final enactment. See S. 158, 78th Cong., 1st Sess. (1943); S. 2598, 77th Cong., 2d Sess. (1942); S. 2445, 77th Cong., 2d Sess. (1942). The term was included by the Congress throughout its extensive deliberations on the measure and should be accorded significance.

In an analoguous context, the term "theretofore" has received judicial scrutiny. "The word 'theretofore' has been judically defined to mean before then." Hamilton v. State, 176 So. 89, 91 (Fla. 1937), relying upon Hume v. United States, 118 Fed. 689, 696 (5th Cir. 1902) (emphasis added). Thus, the use of the term "theretofore" within the merger legislation had judicial significance at the time of enactment and was not an isolated occurrence.

Congress also used the same term in the labor provisions of the Bill which extended preferential hiring status to all discharged employees "over any person who has not theretofore been an employee of any carrier." 47 U.S.C. §222(f)(3) (emphasis added). It would therefore strain the limits of reasonableness to suggest that Congress intended the term to possess different meanings in two sections of the same enactment or to ascribe significance to the term in one section and at the same instance say that it was without meaning in the other.

WUI and ITT's reliance upon Telegraph Service With Hawaii, 28 FCC 599 (1960) is misplaced. After Hawaii's admission as a State, WU indicated its desire to offer its traditional telegraph services between the mainland and Hawaii as a domestic service. Although Hawaii's admission to the Union appeared to alter its status from an international to a domestic point, the Commission remained of the view that Hawaii should not be considered as domestic for WU public message services. The Commission found, consistent with its position herein, that the overriding policy of Section 222 was to prohibit WU from engaging in basic telegraph service to an overseas point notwithstanding Hawaii's admission as a state. The Commission thereafter sought legislative action to clarify this situation. See 47 U.S.C. §222(a)(10). The Commission's holding was limited to the particular service involved; namely public message telegraph. 28 FCC at 616.

In this proceeding, the FCC found Mailgram "to be a new service, not currently being offered by any carrier between the Mainland and Hawaii and not covered by the express statutory language of Section 222. It noted that when WUI and RCA, international carriers, sought to provide domestic satellite service it made a similar construction of the Act. Thus, the Commission has consistently reasoned that Section 222 was intended "to embrace those types of

services being carried on by Western Union at the time of merger. For, it was message telegram service that constituted the principal international business of Western Union at the time of merger." American Satellite Corp., 43 FCC 2d 348, 353 (1973); RCA Global Communications, 42 FCC 2d 774, 780 (1973); United States Transmission System, 48 FCC 2d 359 (1974).11/

In sum, the clear language of the statute, the judicial and administrative meanings previously accorded the operative term at issue, and the inclusion of the term in more than one provision of the statute lead inescapably to the Commission's construction.

11/ Petitioner's reliance upon Western Union Telegraph Co. v. United States, 267 F.2d 715 (2d Cir. 1959) is misplaced. There, this Court found that a portion of the Commission's order fixing an unconditional deadline for submission of a divestment plan by WU to be erroneous. The Court directed that further consideration be given to whether a plan could be produced with due deligence which would satisfy the two requirements of Section 222: (1) "the consideration for property to be divested...be commensurate with its value" and (2) WU's divestment should occur as soon as its "legal obligations" under the Anglo cable lease will "permit." 267 F.2d at 724. In addressing the time table for WU's divestiture, the Court expressed the opinion that in achieving separation of WU's domestic landline monopoly from "all financial interest in international telegraph operations" it was "plain from the legislative history of §222(c)(2) that the Congress never contemplated perfect divorcement." 267 F.2d at 723. (Emphasis added.)

II. The Commission's action also rested on its finding that Mailgram constitutes a new and distinct service from that of traditional public telegraph service. Mailgram originated in 1970 on an experimental basis in order to "test the feasibility of a record message service intermediate in speed and cost between conventional telegrams and first class mail." United Telegraph Workers v. FCC, 436 F.2d 920, 921 (D.C. Cir. 1970). From the outset, WU and the Commission treated mailgram "as a new service which became effective automatically, according to the filed tariff under §204 of the Act, 47 U.S.C. §204." 436 F.2d at 923. As discussed more fully in the Counterstatement, pp. 9-10, Mailgram possesses special characteristics which differentiate it from traditional message telegraph service. (A. 22). The basic characteristic focuses upon the delivery function which is the sole responsibility of the Postal Service, and for which it assumes total accountability.[12/] The Commission equated Mailgram with a form of electronic mail "which combines some aspects of a traditional telegram with those of mail into a hybrid form which is identical to neither." (A. 23).

Thus, Mailgram delivery is subject to the supervision and control of the Postal Service. WU's duties under Mail-

12/ This feature also distinguishes Mailgram from the overnight telegram. (A. 25).

gram are to accept and transmit the message to the Postal Service. At that point, its obligations cease. In the public message telegraph service, WU provides a distinctly different form of end-to-end service in which the carrier is affording the customer a rapid and more reliable delivery of his message. (A. 24).

In United Telegraph Workers v. FCC, supra, the Court affirmed the Commission's decision permitting WU to file the tariff which inaugurated Mailgram as an experimental service. The Court based its decision on the Commission's obligation to apprise itself of emerging innovations in the communications industry:

> "The Commission has a mandate under §218 of the Act...to inform itself of technical advancements and improvements in modes of communication so that 'the benefits of new inventions and developments may be made available to the people of the United States.' This expression of congressional desire that the Commission encourage technological innovation requires us to demand a compelling showing of legislative prohibition before we strike down an experiment such as Mailgram which is designed to furnish the informational input that makes such innovation possible." 436 F.2d at 923-24.

The Court went on to illustrate the innovative delivery feature of the new service when it observed that "while the postal segment of Mailgram is part of the statutory 'wire communication' to be regulated by the Commission

(because it entails the 'delivery of communications,' 47 U.S.C. §153(a) it cannot be so regulated because the Commission has no authority over other federal entities...." 436 F.2d at 924. The Court found the Commission had ample authority to permit WU to initiate its new service by a tariff filing under 47 U.S.C. 204.[13/] This decision, as well as the Commission's finding in this case, support the conclusion that Mailgram is a new service not theretofore provided by WU.

13/ Both WUI (WUI Brief at 30-32) and ITT (ITT Brief at 32-33) contend that since the Court found that Mailgram did not constitute a new line or channel of communication within the meaning of Section 214 that the service cannot be classified as a new offering. They overlook the Court's finding that the Section 214 authorization was unnecessary inasmuch as WU's facilities to provide this new service domestically were already in place. United Telegraph Workers v. FCC, 920 F.2d at 925.

III. The Commission found that the potential or prospect for any abuses by WU of the kind that had concerned Congress in enacting Section 222(c)(2) were absent. WUI and ITT assert that WU's current domestic monopoly position portends the same prospect for predatory behavior which prompted Congress to enact the divestment clause. However, since 1943, the domestic telegraph industry has experienced significant alterations and has witnessed the diversification of WU's services. Liebhafsy, American Government and Business 487 (1971). No longer does WU enjoy the dominance it did following the merger.[14/] (A. 27). This is evident from expanded telephone usage as well as the development of other advanced and competing communications mediums such as telex and leased channels that have resulted in a steady reduction in WU's public message telegraph service. See International Record Carriers Communications, 38 FCC 2d 543, 545-46 (1972). (1972).

Moreover, the competitive posture between WU and the international carriers has been strenghtened by the

14/ The dominant international carriers RCA, ITT, and WUI presently enjoy strong profitability. For the most recent year for which figures are available (1974), ITT showed a rate of return of 16.99% earning $35,358,415, RCA a rate of 10.82% earning $27,167,297, and WUI 12.99% earning $12,252,198. In contrast, WU for the same year showed a rate of return or only 7.10% and earned $69,449,000.

Commission's policies of "paid direct access," All America Cables & Radio, 15 FCC 293 (1950),[15/] and the proposed expansion in both area and the number of gateway cities in which the international carriers may pick up and deliver international messages.[16/] International Record Carriers Communications, FCC 76-174, 58 FCC 2d ____ (February 26, 1976). Also, Commission authorization of a variety of private-line services by the specialized common carriers has altered the structure of the industry. See, e.g., United States Transmission System, 48 FCC 2d 859 (1974).

Furthermore, as is clear from the legislative history, the dominant purpose underlying enactment of the divestment clause was the fear that WU would be able to use its monopoly position unfairly to favor its own international message operations. See, e.g., Hearings on S. 2598, 77th Cong. 2d Sess. 180 (1942). As the Commission noted, 55 FCC 2d at 680, (A. 45) this concern arose from the total dependence of the international carriers on WU for the bulk of the domestic handling ov overseas messages. Thus, WU by unfair practices might drive the international carriers out of business if

15/ In that case, the Commission allowed customers, at their own expense, to file overseas messages directly with the international carriers or to direct the carriers to deliver inbound messages to them through the use of telephone, TWX or the mails, bypassing the WU domestic landline system.

16/ Under Section 222(a)(6) of the Act, a gateway is a city approved by the Commission as a terminal for overseas facilities where the international carriers may conduct direct public operations and interconnect with domestic carriers for service to points outside the gateway.

it chose to do so. That overwhelming power does not exist with respect to Hawaii Mailgram.

Since WU does not offer international message service, it would not be in a position to divert such traffic from the international carriers to its lines. It is unreasonable to assume that WU would unilaterally change a telegraph message filed by a customer to a Mailgram since that would be a violation of the Communications Act. 47 U.S.C. §§201-205 (1971). The only reasonable way in which WU might "divert" message traffic to Mailgram would be through advertising the cost benefits of its service. This could hardly be called an abuse since it is a normal concomitant of a competitive service offering and one in which the international carriers presently engage.

The real basis of the international carriers' concern is that WU's Mailgram service will prove popular and will result in customers' electing to use it in preference to the more expensive message service. While the carriers may fear the effects of competition from Mailgram, they cannot reasonably rely on Section 222 to protect them from fair competition.

Under Section 214, the Commission may validly adopt restrictive or liberal entry policies pursuant to the public interest standard. See generally, Radio Relay Corp.

v. FCC, 409 F.2d 322 (2d Cir. 1969) and cases cited therein. The Commission is empowered under Section 214 to issue certificates of public convenience and "attach to the issuance of the certificate such terms and conditions as in its judgment [the public interest] may require." 47 U.S.C. §214. Accordingly, the international carriers will be amply protected from any prospect of competitive abuses in the event that WU is authorized to provide Mailgram service to Hawaii.

When it was faced with a similar concern regarding an authorization to an ITT-affiliated company the Commission observed that "to deny USTS the opportunity to serve as a common carrier on the basis of mere allegations of potential abuse would not be appropriate." United States Transmission System, 48 FCC 2d at 861. "[I]n any event... it is sufficient to point out that the Commission has adequate regulatory jurisdiction under Titles II and III of the Communications Act to prevent...any...carrier competing in the...communications market, from employing unfair competitive practices." 48 FCC 2d at 862.

In Radio Relay, supra, 409 F.2d at 329, this Court agreed that FCC licensing procedures offered a means of preventing competitive abuses, Recently, the D.C. Circuit reached a similar conclusion in National Ass'n of Regulatory Com'rs v. FCC, 525 F.2d 630 (D.C. Cir. 1976):

> In spite of our conclusion that significant anticompetitive effects may well result in the form of AT&T mono-

> polization of [the] highly competitive dispatch market, the court holds that the...allocation is not at this time, a breach of the broad discretion allocated to the Commission under the statute. The anticompetitive effects envisioned above are contingent upon a variety of factors surrounding the development and implementation of cellular technology.... The Commission retains a duty of continual supervision of the development of the system as a whole, and this includes being on the lookout for possible anticompetitive effects. The serious anticompetitive effects, if they arise at all, will do so only after full implementation begins. 525 F.2d at 638 (Emphasis added.)

In this posture, any questions relating to anti-competitive abuses will be thoroughly considered by the Commission in its comparative consideration of the various applications. The introduction of this argument at this time is obviously premature.[17/] Further, should WU, either indivi-

17/ ITT's argument, based upon 47 U.S.C. §314 and the anti-trust laws, is premature since the Commission has not yet considered WU's application under the public interest standard. Nor has the Commission authorized WU to provide Mailgram service to Hawaii. A similar situation recently arose in the D.C. Circuit when a Commission decision that IBM and Comsat Satellite Corp. were eligible to apply to provide domestic satellite service was appealed on the grounds that the Commission failed to convene a hearing to resolve antitrust allegations. Petition For Approval of Changes In Corporate Structure of CML Satellite Corp., 51 FCC 2d 14 (1975). The Court dismissed the appeals ruling that the order sought to be reviewed was not final agency action ripe for review. RCA Global Communications, Inc., et al. v. FCC, D.C. Cir. No. 75-1236, (Feb. 23, 1976). (Addendum). Moreover, ITT's abstract legal arguments conflict with the Supreme Court's construction of the Communications Act in FCC v. RCA Communications,Inc. , 346 U.S. 86, 97-98 (1953). See also Mackay Radio and Telegraph Co. v. FCC, 97 F.2d 641, 645 (D.C. Cir. 1938). Cf. Network Project v. FCC, 511 F.2d 786, (D.C. Cir. 1975), and cases cited at 592-593.

dually or jointly with other carriers, be authorized to extend this service from the Mainland to Hawaii, the Commission has sufficient authority to arrest any and all abuses that may arise.

CONCLUSION

We have emphasized throughout that this case presents the Court with a narrow question of statutory construction. The decisive issue focuses upon the validity of the Commission's order to allow WU to file its Mailgram application. This was the precise issue raised by the parties below and the sole question determined by the Commission. Accordingly, for the reasons shown herein, the Commission's Memorandum Opinion and Order should be affirmed.

Respectfully submitted,

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April 6, 1976

ADDENDUM

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 75-1236 September Term, 19 75

RCA GLOBAL COMMUNICATIONS, INC. *et al.*, Appellants

v.

FEDERAL COMMUNICATIONS COMMISSION

CML Satellite Corporation *et al.*, Intervenors

No. 75-1237

RCA GLOBAL COMMUNICATIONS, INC. *et al.*, Petitioners

v.

FEDERAL COMMUNICATIONS COMMISSION *et al.*, Respondents

CML Satellite Corporation *et al.*, Intervenors

Before: WRIGHT, TAMM, and LEVENTHAL, Circuit Judges

ORDER

These causes came on for consideration of the motion to dismiss filed by the Federal Communications Commission and of the oppositions filed thereto. Briefs have been filed herein by the parties.

This court finds that the order sought to be reviewed in these cases is not final agency action ripe for review. *See Bethesda-Chevy Chase Broadcasters v. FCC*, 128 U.S. App.D.C. 185, 385 F.2d 967 (1967); *Thermal Ecology Must Be Preserved v. AEC*, 139 U.S.App. D.C. 366, 433 F.2d 524 (1970). Our ruling should not be taken as an indication of the court's position with respect to the Commission's handling and disposition of the anti-trust issue, particularly as to the need for an evidentiary hearing to determine the competitive impact of the Commission's interlocutory ruling. *See amicus* brief of the Federal Trade Commission at 4-23. *See also Gulf States Utilities Co. v. FPC*, 411 U.S. 747, 760 (1973).

On consideration of the foregoing, it is ORDERED by the court that these cases be, and they are hereby, dismissed.

Per Curiam

For the Court

George A. Fisher

George A. Fisher
Clerk